BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANET DENYER	)	
Claimant	)	
	)	
VS.	)	
	)	
KC TAN CO., INC.	)	
Respondent	)	Docket No. 1,032,294
	)	
AND	)	
	)	
LIBERTY INSURANCE CORP., and HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carriers	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent and one of its insurance carriers, Hartford Accident & Indemnity Company, (Hartford) requested review of the April 18, 2007, preliminary hearing Order and the April 24, 2007, Order Nunc Pro Tunc entered by Administrative Law Judge Steven J. Howard. Michael R. Wallace, of Shawnee Mission, Kansas, appeared for claimant. Brenden W. Webb, of Overland Park, Kansas, appeared for respondent and its insurance carrier, Hartford. James P. Wolf, of Kansas City, Kansas, appeared for respondent and its insurance carrier, Liberty Insurance Corp. (Liberty). Jeffrey A. Dehon, of Kansas City, Kansas, appeared for the Kansas Workers Compensation Fund (Fund). Daniel L. Doyle, of Overland Park, Kansas, appeared for respondent (uninsured).

The Administrative Law Judge (ALJ) found that claimant was entitled to temporary total disability benefits at the maximum rate commencing January 9, 2007, until released to substantial or gainful employment and medical treatment to be provided by Dr. Lynn Ketchum. The ALJ ordered the temporary total disability benefits and the medical treatment to be provided by respondent/Hartford.

The record is the same as that considered by the ALJ and consists of the transcript of the April 17, 2007, Preliminary Hearing and the exhibits, and the transcript of the deposition of John Moran taken March 5, 2007, together with the pleadings contained in the administrative file.

ISSUES

Respondent and Hartford argue that the ALJ exceeded his jurisdiction in finding that claimant's injury arose out of and in the course of her employment with respondent. Respondent and Hartford claim that claimant misstated the amount of time per day she spent wiping down tanning beds. They contend that claimant's position with respondent was primarily administrative. Respondent and Hartford also argue that the ALJ exceeded his jurisdiction in finding that claimant's date of accident occurred during Hartford's coverage period.

Respondent and its insurance carrier, Liberty, request that the Board affirm the ALJ's finding that Liberty does not have liability in this case. Respondent and Liberty argue that Liberty does not have coverage for any of the possible dates of accident in this case. Respondent and Liberty also contend that claimant did not prove that her injury arose out of and in the course of her employment and that claimant did not give proper notice of her alleged accident.

The Fund did not file a brief in this appeal.

Respondent (uninsured) contends that Dr. Cassandra McKarnin was claimant's authorized treating physician. Respondent (uninsured) further contends that Dr. McKarnin did not take claimant off work or restrict her work because of her cubital tunnel syndrome until January 29, 2007. Accordingly, respondent (uninsured) requests that the Board affirm the Order and Order Nunc Pro Tunc of the ALJ.

Claimant requests that the Board affirm the ALJ's Order and Order Nunc Pro Tunc in their entirety. Claimant contends that the testimony and medical evidence supports the conclusion that she was injured out of and in the course of her employment. Claimant also asserts that the ALJ correctly found her date of accident to be January 29, 2007, because there was no evidence that she received written notification that her diagnosis was work-related before that date.

The issues for the Board's review are:

(1) Did claimant suffer injury by accident arising out of and in the course of her employment with claimant?

(2) If so, based on K.S.A. 2006 Supp. 44-508, what is claimant's date of accident?

(3) Did claimant give timely notice of her accident?

FINDINGS OF FACT

Claimant began working for respondent in January 2004 as manager. When she first started working for respondent, it was owned by Amy Pierce. John Moran took over ownership of respondent in August 2005. In October 2006, Donald and Gwen Thompson became part-owners of respondent. Claimant's job duties as manager included hiring and terminating employees, product ordering, merchandising, maintenance, office work, paperwork, typing, and cleaning the tanning beds. Cleaning the tanning beds required her to support her body on her right arm and then reach above shoulder level to the to the top of the bed. On September 1, 2005, claimant was appointed as secretary of the corporation. Mr. Moran was president of the corporation. As secretary, claimant was expected to handle the daily operations of respondent's business. She was not required to consult with him on anything, but from time to time she did. When Ms. Thompson became a shareholder of the corporation, claimant made a list of duties she had performed that Ms. Thompson would be taking over. Cleaning tanning beds was not listed as a task on that list.[1]

In May 2004, claimant started noticing a severe burning in her elbows. As she cleaned the tanning beds, the pain would worsen. Claimant estimated she cleaned from 30 to 170 beds per day and spent 60 percent of her time performing this task. Claimant started developing numbness in her hands and popping in her right shoulder. She told Ms. Pierce about her condition in May 2004 and told Mr. Moran in 2005. She did not provide either Ms. Pierce or Mr. Moran written notice.

Respondent did not provide claimant with any medical treatment, so she sought treatment under her personal health insurance in August 2006. She saw Dr. McKarnin, who ran tests to rule out diabetes, arthritis and other possible causes of hand numbness. Dr. McKarnin sent claimant to Dr. Vito Carabetta, who performed tests and found claimant had moderate right cubital tunnel syndrome. On November 3, 2006, Dr. McKarnin filled out Family Medical Leave Act (FMLA) papers, listing as medical facts that claimant was experiencing numbness to her hands and joint pain at the wrists and hands, as well as anxiety issues. On the FMLA form, Dr. McKarnin indicated that claimant was unable to perform work of any kind. She took claimant off work at that time. Claimant faxed the FMLA papers to both Mr. Moran and to the respondent's office.

Dr. McKarnin sent claimant to Dr. Brad Storm on December 28, 2006. Dr. Storm wrote a letter on December 28, 2006, addressed "To Whom It May Concern" requesting preapproval for cubital tunnel release surgery for claimant. That letter states:

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[1] *Id.*, Resp. Ex. D.

> Her onset of disease process started while she was employed at KC Tan and given the nature of her job and the fact that onset was while she was employed at this position, I would consider her cubital tunnel syndrome a work-related accident problem.

Claimant returned to Dr. McKarnin. On January 29, 2007, Dr. McKarnin wrote a letter addressed "To Whom It May Concern."[2] In that letter, Dr. McKarnin noted that claimant had been tested for lupus and other autoimmune diseases, and those tests were negative. Dr. McKarnin indicated that Dr. Carabetta performed an EMG of claimant that showed slowing of the conduction velocity across the elbow for the right ulnar nerve, which was consistent with right cubital tunnel syndrome. Dr. McKarnin noted that claimant had tried anti-inflammatory medications without success, and had also been advised on modifying her work station and trying not to use repetitive movements, also without success. She also indicated that Dr. Storm believed claimant's only recourse for treatment involved a cubital tunnel release. The parties stipulated that January 29, 2007, is the first date there is written reference by a physician regarding claimant's condition other than the FMLA document.

Claimant is not making a claim that as secretary of respondent/corporation, she had the authority to send herself to authorized treatment. To the best of her knowledge, all the treatment she has received has been unauthorized.

When claimant gave respondent her FMLA paperwork, it was her understanding that at least part of the reason she was being taken off work was because of the symptoms she was experiencing with numbness in her hands, and joint pain at her wrists and hands. Claimant claims that at the time she turned in the FMLA paperwork, no decision had been made about her diagnosis so she was not sure she had been hurt at work.

Claimant filed an Application for Hearing that was received by the Division on December 13, 2006, claiming a "repetitive series from March 2004 through December 2006" because of "repetitive usage of right hand, arm and elbow cleaning tanning beds."[3] An Amended Application for Hearing was filed on March 21, 2007, claiming "[r]epetitive trauma through 1/29/07" caused by "[r]epeated work activities."[4] Claimant claimed injuries to her "right upper extremity." On March 26, 2007, claimant again filed an Amended Application for Review, this time claiming a "[W]hole body disability, including shoulders."[5]

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[2] P.H. Trans. (April 17, 2007), Cl. Ex. 1 at 1.

[3] Form K-WC E-1, Application for Hearing filed December 13, 2006.

[4] Form K-WC E-1, Application for Hearing filed March 21, 2007.

[5] Form K-WC E-1, Application for Hearing filed March 26, 2007.

Mr. Moran received claimant's FMLA paperwork. He had the understanding that her FMLA was about stress. He had no idea that it was work related. He admits, however, that he did not read the FMLA paperwork. Later, he received a letter from claimant's attorney stating that she wanted to file a workers compensation claim. He responded to claimant's attorney that if claimant needed to see a doctor, respondent had no problem with her seeing a doctor. Mr. Moran said that claimant did not need his permission to see a doctor because she ran the company.

On December 6, 2006, claimant's former attorney received an email from Mr. Moran that stated: "We are currently investigating [claimant's] injury claim. Until we complete our investigation, we do accept responsibility for this claim and do not authorize any medical procedures related to the claim."[6]

Mr. Moran said that claimant stopped showing up for work in September 2006. She was not fired. He did not know why she stopped coming to work. Claimant paid herself through November 15, 2006.[7] She testified she continued to work for respondent through the whole month of November. However, November 7 was the last day she has documented as having made a telephone call on behalf of respondent. After that, she said she "moved their stuff back to them the entire month and worked the entire month."[8]

Gwen Thompson testified she did not believe that claimant spent 60 percent of her time wiping down tanning beds. She came to work at respondent on October 1, 2006. Since that date, she and her husband have been managing respondent's business. She does not know what claimant did before that time period.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

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[6] P.H. Trans. (April 17, 2007), Resp. Ex. I.

[7] *Id.* at 35.

[8] *Id.* at 33.

[9] K.S.A. 1999 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

K.S.A. 2006 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and

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[11] *Id.* at 278.

> address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-532a(a) states in part:

> If an employer has no insurance to secure the payment of compensation, as provided in subsection (b) (1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

Dr. Storm relates claimant's cubital tunnel syndrome to her work with respondent. There is no contrary opinion. Claimant describes the onset of her symptoms as occurring during her employment with respondent and in particular describes her job task of cleaning tanning beds as causing her symptoms to worsen. Claimant has proven she suffered personal injuries through a series of accidents each and every working day through her last day work on or about November 7, 2006. She gave notice of her injuries to her employer on several occasions, but it is not clear she attributed her conditions to work until December 2006 when Dr. Storm made that connection and she filed a claim for workers compensation benefits. There is no question but that claimant gave respondent notice of a work-related

[12] K.S.A. 44-534a.

[13] K.S.A. 2006 Supp. 44-555c(k).

injury in December 2006 when her attorney sent Mr. Moran a letter requesting authorized medical treatment. It is not clear when Mr. Moran received that letter, but it would have been sometime before Mr. Moran sent the email to claimant's former attorney on December 6, 2006.

Claimant was not taken off work by an authorized physician. Therefore, her date of accident under K.S.A. 2006 Supp. 44-508(d) is the earliest of either the date she gave written notice to respondent or the date the condition was diagnosed as work related. In this case, neither of those two triggering events occurred while claimant was still working for respondent. Therefore, the date of accident must be determined "based on all the evidence and circumstances."[14] This Board Member finds claimant's date of accident was the last day she performed work for respondent, which was approximately November 7, 2006. Nevertheless, because she did not become aware that her condition was work related until after 10 days from her date of accident, there is just cause to extend the time for giving notice to 75 days. Therefore, her notice in early December 2006 was within 75 days of her date of accident and was timely.

CONCLUSION

Claimant suffered personal injury by a series of accidents that arose out of and in the course of her employment with respondent each and every working day through her last day worked on or about November 7, 2006. She gave respondent timely notice of her accidents and injuries. Accordingly, her claim is compensable, and the ALJ's award of preliminary benefits, including temporary total disability and medical treatment, is affirmed. Respondent and its insurance carriers should be jointly and severally liable for the cost of those benefits.[15] The Fund is not included in the joint and several liability because there has not been a showing that respondent is financially unable to pay the compensation ordered as preliminary benefits.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that Administrative Law Judge Steven J. Howard's Order of dated April 18, 2007, and the Order Nunc Pro Tunc dated April 24, 2007, are modified to make respondent, Liberty and Hartford jointly and severally liable for the ordered benefits but is otherwise affirmed.

IT IS SO ORDERED.

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[14] K.S.A. 2006 Supp. 44-508(d).

[15] *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 150 P.3d 316 (2007).

Dated this _____ day of July, 2007.

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier, Hartford
James P. Wolf, Attorney for Respondent and its Insurance Carrier, Liberty
Jeffrey A. Dehon, Attorney for Kansas Workers Compensation Fund
Daniel L. Doyle, Attorney for Respondent
Steven J. Howard, Administrative Law Judge